

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA,)	
)	
Plaintiff,)	
)	
v.)	Case No. 05-cv-329-GKF(SAJ)
)	
TYSON FOODS, INC., et al.,)	
)	
Defendants.)	

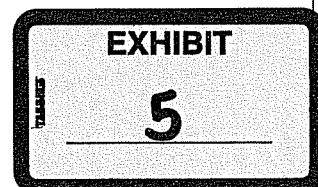
DECLARATION OF JOHN BERTON FISHER, PH.D.

I, John Berton Fisher, Ph.D., state the following:

1. I have been retained by the Oklahoma Attorney General to provide analysis, advice and opinions on the fate and transport of land applied poultry waste and to evaluate and provide opinions on poultry waste generation and disposal practices.

2. I previously submitted an affidavit in this matter that was an exhibit to the Motion for Preliminary Injunction on November 14, 2007. I gave a deposition in this matter regarding the opinions set out in my affidavit submitted as an exhibit to the Motion for Preliminary Injunction and submitted an Expert Report in this matter on May 15, 2008.

3. I gave a deposition in this matter regarding my May 15, 2008, Expert Report on September 3 and 4, 2008.



4. My training and experience is set out in my affidavit filed on November 14, 2007 and in my Expert Report of May 15, 2008.

5. I have reviewed the Defendants' Joint Motion to Enforce Scheduling Orders in Light of Plaintiffs' Expert Disclosure Abuses. I have reviewed the First, Second, Third, Fourth and Fifth Declarations of Defendants' retained expert Victor Bierman, Jr. I have also reviewed the First, Second, and Third declarations of Defendants' retained expert Timothy Sullivan.

6. In reviewing my Expert Report in preparation for my deposition on September 3 -4, 2008, I discovered that I made a mistake in a computation that either resulted from an error in a spreadsheet computation or from an incorrect download of chemical data from a database. This analysis related to my opinion concerning the distinctions among the compositions of poultry waste, cattle waste and waste water treatment plant effluent. This error resulted in the computation of incorrect values for the ratios of Total Zinc/Total P, Total Cu/Total P and Total As/Total P for poultry waste; the ratios of Total Zinc/Total P and Total Cu/Total P for cattle waste; and the ratios of Total Zinc/Total P, Total Cu/Total P, Total As/Total P and Total Zn/Total Cu for waste water treatment plant effluent.

7. I prepared revised pages for pages 39 through 41 of my Expert Report that corrected these calculation errors. These corrected pages were provided to the Defendants at my deposition on September 4, 2008, and were also provided a second time to Defendants on September 18, 2008 (discussed below).

8. Opinion 18 of my May 15, 2008, Expert Opinion, concludes that the chemical composition of poultry waste is distinctly different from the chemical composition of cattle waste and also is distinctly different from waste water treatment plant effluent. This opinion and conclusion remains unchanged by the revised ratio calculations that were provided in the revisions to my Report at pages 39 through 41. Although the corrected ratios given in the revised pages 39 through 41 of my Expert Report are in some instances individually different for poultry waste, cattle waste or waste water treatment plant effluent, overall and in combination, substantial differences remain between one or more of these ratios among poultry waste, cattle waste and waste water treatment plant effluent. These substantial differences still support My Opinion 18 that the chemical compositions of these wastes are distinctly different and would thereby be distinctly observable in the environment. As a consequence, the corrected ratios still support the opinion that the chemical composition of poultry waste is distinctly different from the chemical composition of cattle waste and waste water treatment plant effluent. The statements: "...Plaintiffs produced an errata sheet for Dr. Fisher's expert report that completely rewrote his conclusion 18" and "These errata radically change the conclusion, altering results by factors of up to 10,000 ..." in the Defendants' Joint Motion to Enforce Scheduling Orders in Light of Plaintiffs' Expert Disclosure Abuses are not true and are misleading.

9. Following my deposition, I discovered some typographical errors and an additional mistaken computation. The typographical errors found involved:

- a. The inadvertent presence or omission of a word or words on pages 5, 6, 19, 52, 54, 56, 58 and 61.

- b. Inadvertently transposed or erroneous footnote references on pages 15 and 18.
- c. An incorrect spelling of page 38.
- d. A transposed number on page 59.
- e. An incorrect figure reference on page 59.

10. The mistaken computation involved calculating the statistical data for the chemical parameters presented in Table 10 (on page 37 of my Expert Report) for poultry waste on an “as received” rather than a “dry weight” basis (i.e. the chemical data were not adjusted for moisture content). Correction of chemical parameter data to a “dry weight” basis from an “as received” basis permits direct comparison of the magnitude of individual parameter values among materials of variable moisture content. Correction of chemical parameter data to a “dry weight” basis from an “as received” basis has no effect on the ratios of chemical parameters among materials of variable moisture content (i.e. the ratio of the magnitudes of Parameter A and Parameter B (A/B) will not change if the magnitudes of the parameters are adjusted for the moisture content of the sample). Correction of chemical parameter data used as the basis for the values calculated and provided in Table 10 (on page 37 of my Expert Report) required the correction of:

- a. Values of the various parameters discussed in text on page 36 of my Report.
- b. Re-plotting the data presented on Figures 8, 17, 20, 24 and 32 of my Report.

11. Correcting the measured chemical parameters for poultry waste used as the basis for the Table 10 and for Figures 8 (which also required the correction of the measured chemical parameters for cattle waste) 17, 20, 24 and 32 from an "as received" to a "dry weight" basis did not result in altering any opinions presented in my Expert Report.

12. To correct these typographical errors and the mistaken computation, I prepared a comprehensive Errata (including those errata provided to Defendants on September 4, 2008) that was provided to the Defendants on September 18, 2008.

13. Defendants' Joint Motion to Enforce Scheduling Orders in Light of Plaintiffs' Expert Disclosure Abuses state with respect to Dr. Olsen's expert report that, "Parts of his report were drawn directly from Dr. Harwood, and Drs. Brown and Fisher wrote entire sections." Prior to this statement, Defendants claim that they "...learned in Dr. Olsen's September 10-11 deposition that Dr. Olsen only wrote a fraction of his report." These statements are both erroneous and misleading. I am familiar with Dr. Olsen's Report, and I was not asked to, and did not write any of Dr. Olsen's Report. Section 6.3 of Dr. Olsen's Report is entitled, "The Geology and Hydrogeology of the IRW in Relation to the Fate and Transport of Contamination." The first sentence of this section reads, "This section summaries major conclusions and observations of Dr. J. Berton Fisher's Expert Report (Fisher, 2008)." In Section 6.4.3.2 of his Report entitled "Phosphorus in Poultry Diets", Dr. Olsen again cites my Expert Report in his discussion of the composition and compounding of poultry feeds. In the opening paragraph of Section 6.7.2 of his Report entitled, "Distribution of Chemicals in Lake Tenkiller Sediments", Dr. Olsen writes, "The

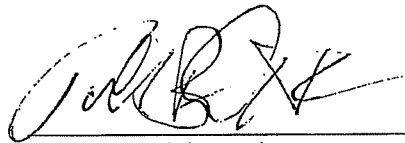
following paragraphs are summarized from Dr. J. Berton Fisher's expert report (Fisher, 2008)."

to preface the discussion of the chemical composition of Lake Tenkiller sediments that is, in fact, summarized from my Expert Report. In Section 6.8.3 of Dr. Olsen's Report entitled, "Contaminant Movement from EOF to Lake Tenkiller", he summarizes elements of my Expert Report, and provides specific citations linking his summary to my Expert Report. Thus, it is clearly stated that Dr. Olsen is summarizing information presented in my Expert Report. This was clear to the Defendants at the time they first obtained Dr. Olsen's Report that was delivered to Defendants at the same time that my Expert Report was delivered – May 15, 2008.

Defendants' claim that I wrote an entire section of Dr. Olsen's report is false and their intimation that the Defendants' made such a discovery at Dr. Olsen's deposition on September 10-11, 2008, is misleading.

I declare under penalty of perjury, under the laws of the United States of America, that the foregoing is true and correct.

Executed on the 24TH day of September, 2008.

A handwritten signature in black ink, appearing to read 'J. Berton Fisher', written over a horizontal line.

J. Berton Fisher, Ph.D.